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In the Supreme Court

October Term, 1901.

UNITED STATES.

In the Matter of the Application of Osaki Mankichi for a Writ of Habeas Corpus.

Appeal of the Territory of Hawaii from the District Court of the United States in and for said Territory.

BRIEF FOR APPELLEE

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1902.

IN THE

Supreme Court of the United States.

IN THE MATTER OF THE APPLICATION
OF OSAKI MANKICHI
FOR A WRIT OF HABEAS CORPUS.

APPEAL OF THE TERRITORY OF HAWAII FROM THE DISTRICT COURT OF THE UNITED STATES IN AND FOR SAID TERRITORY.

BRIEF FOR APPELLEE.

I.

STATEMENT OF THE CASE.

The appellant, Osaki Mankichi, was indicted for the crime of Murder in the First Degree, and a True Bill was found upon this indictment on the 4th day of May, A. D. 1899.

The following appears upon the indictment, "A true Bill found this 4th day of May, A. D., 1899", signed, "A. Perry, First Judge of the First Circuit Court, presiding at the term."

By virtue of this Indictment, the prisoner was put upon his trial at the May term of the Circuit Court, A. D., 1899, before the Hon. A. Perry, First Circuit Judge, and by a Jury was found guilty of Manslaughter in the First Degree and was by the Hon. A. Perry sentenced to be imprisoned at hard labor for a term of twenty years.

The verdict of Guilty was rendered by nine (9) only of the Jurors; three of the jurors who sat upon the trial of this cause dissented from the verdict. The same Judge who found the

True Bill under the Indictment presided at the trial and sentenced the prisoner.

II.

Argument.

The first assignment of error, *i. e.* that the Court erred in granting a Writ of Habeas Corpus. It is submitted and contended that the United States District Court rightfully assumed jurisdiction in this case because it clearly appears that the Circuit Court had no jurisdiction to try, convict, and sentence this prisoner upon an Indictment which was not found by a Grand Jury duly and regularly summoned in accordance with Art. V of the Constitution of the United States.

The Hawaiian Islands on the 7th day of July, A. D., 1897, by a Joint Resolution of Congress and the Senate, was annexed to the United States and became a part of the Union and subject to the sovereign dominion thereof. By the terms of this Joint Resolution the Municipal Laws of the Hawaiian Islands, not inconsistent with the Joint Resolution *nor contrary to the Constitution of the United States,* are continued in force until Congress shall otherwise determine.

On the 14th day of August, A. D., 1898, the formal transfer of the Sovereignty of the Republic of Hawaii, and its acceptance by the United States took place. The American Minister to the Republic of Hawaii at the time of the formal transfer said to the President of the Republic of Hawaii, "Mr. President, in the name of the United States, I accept the transfer of the Sovereignty and the transfer of the Property of the Hawaiian Government." The Hawaiian flag was then lowered and the Stars and Stripes raised by direction of the Minister.

The Republic of Hawaii ceased to exist on the 14th day of August, A. D., 1898, and the Hawaiian Islands became United States territory.

This prisoner was tried in United States territory without the indictment of a Grand Jury by a Circuit Judge, who was continued in office under the Newlands Resolution. The President of the United States had the power to remove the Judge who tried this prisoner, and yet it is contended that the Constitution did not apply. The words of the Resolution are, "Municipal legislation not contrary to the Constitution of the United States shall remain in force until Congress shall otherwise determine." See *United*

States vs. *Arredondo*, 6 Peters 691-748; 9 Wall 32; *Davis* vs. *Concordia*, 9th Howard 280.

United States District Court was bound to grant the application of this prisoner for a Writ of Habeas Corpus. The Writ of Habeas Corpus extends to the prisoner who is in custody in violation to the Constitution of the United States. *Ex parte Dore*, 3 Howard 103; *Ex parte Barnes*, 1 Sprague 133; *Ex parte Bridges*, 2 Woods 428.

The actual delivery of this Country took place on the 4th day of August, A. D., 1898, and the Sovereignty formally passed on that day from the Republic of Hawaii to the United States. The national government of the Union, by the voice of the people, had added these islands and made them a part of the body politic and corporate, and the United States Government was then invested with supreme authority here for national purposes, with power to exercise all such authority that was expressly or impliedly committed to its jurisdiction by the Constitution. See Potter's Dwarris on Stat. & Constitutions, Sec. 333. *Congress which is only the creature of the Constitution*, cannot make any such change in such fundamental law. See P. D. on Stat. and Con. 355.

The Constitution of the United States is an original, written, federal and social compact, freely and voluntarily entered into by the several States and ratified by the people, and the Federal Government is bound by that Constitution to every citizen of the United States. P. D. Stat. and Con. 355.

Trials, therefore, at least such as are criminal, are to be regular and conducted in their essential features, not by statute but by the Common Law. This is the constitutional guaranty. *P. D. Stat. and Con.* 437.

Art. V of the Constitution of the United States provides that no prisoner can be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. Grand Juries alone can find probable cause to put a prisoner on trial under an Indictment by finding a True Bill. See *Ex parte Bain* 121 U. S. 1 1-2; *Hill* vs. *People*, 16 Mich. 351; *United States* vs. *Taylor*, 11 Fed. Rep. 421; *Cancemi* vs. *People*, 18 N. Y. 129; *Ex parte Wilson*, 114 United States 417.

This Court held in the case of ex parte Bain that according to principles long settled a prisoner who stands sentenced to the Penitentiary upon an Indictment that has been changed by a prosecuting officer without the consent of the Court is entitled

to his discharge upon a Writ of Habeas Corpus. The statute of the Republic of Hawaii was not only contrary to and inconsistent with this provision of the United States Constitution, but a direct violation to the Constitution and an infringement upon the liberty of the citizen.

It is contended that the conviction was absolutely null and void. There was nothing before the Court on which it could hear evidence or pronounce sentence. This case comes within the principles laid down by this Court. See *Ex parte Lange*, 85 U. S. 18, Wallace 163 1-2; *Ex parte Parks*, 93 U. S. 18, and *Ex Parte Wilson*.

Ex parte Bain expressly overrules the case of Hurtado vs. the People of California, 110 U. S. 516.

The statement in the brief of the Attorney General of the Territory that the Grand Jury was foreign to Hawaiian Law under the Republic of Hawaii and the Monarchy which preceded it and that Section 616 of the Penal Laws of 1897, which is a direct violation of the United States Constitution, can have but little weight. The Constitution must govern.

On the 5th day of July, A. D., 1900, the Supreme Court of the Territory of Hawaii prescribed certain rules relating to Grand Juries:

Rule 1st prescribes: When Required.
" 2: How drawn.
" 3: Qualification of Jurors.
" 4: Number of Jurors.
" 5: Sessions.
" 6: Challenges.
" 7: Foreman.
" 8: Oath to Grand Jurors.
" 9: Charge of the Court.
" 10: Affairs in Attendance.
" 11: Retirement of the Grand Jury.
" 12: Clerk.
" 13: Subpoena of Witnesses.
" 14: Swearing Witnesses.
" 15: Presence of Others with Jurors.
" 16: Twelve Grand Jurors to Concur.
" 17: Endowment by Former and Prosecuting Officer.
" 18: Presenting and Filing.

Had these rules been prescribed by the Circuit Judge at the time of the formal transfer of the Sovereignty of this Country, the Grand Jury system would not have been foreign to Hawaiian

Law. These rules contain all there is in Hawaiian jurisprudence upon the Grand Jury system.

III.

The United States District Court did not err in assuming jurisdiction of the prisoner's application for a Writ of Habeas Corpus because it clearly appears by the petition filed in that Court that the Circuit Court of the Hawaiian Islands, under this Indictment, had no jurisdiction to try this prisoner for the crime of murder.

This Honorable Supreme Court in the case of re Frederick, 149 U. S. 70, held that the Writ of Habeas Corpus is the proper remedy where the verdict or sentence attacked is clearly void by reason of its having been rendered without jurisdiction, or by reason of the Court having exceeded its jurisdiction.

Mr. Justice Harlan in *ex parte Royal*, 117 U. S. 241, held where a person is in custody under process from a State Court of original jurisdiction for an alleged offence against the laws of such State and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the Circuit Court has a discretion whether it will discharge him upon Habeas Corpus in advance of his trial in the Court in which he is indicted, that discretion, however, to be subordinated to any special circumstances required in immediate action. When the State Court shall have finally acted upon the case, the Circuit Court still has a discretion whether under all circumstances then existing, the accused, if convicted, shall be put to his Writ of Error to the higher Court of the State or whether it will proceed by Writ of Habeas Corpus summarily to determine whether the petitioner is restrained of his liberty in violation to the Constitution of the United States.

The only ground on which this Court, or any other Court, without some statute authorizing it, will give relief on Habeas Corpus to a prisoner under conviction and sentence to another Court is the want of jurisdiction in such Court, rendering its proceedings void. These proceedings are absolutely void and the neglect to prescribe the rules and the calling of a Grand Jury is sought to be avoided by contending that the Constitution of the United States was not in force in the Hawaiian Islands until after the passage of the Act to Provide a Government for the Territory of Hawaii. The following authorities are relied on in support of the jurisdiction: *Neagles, case of*, 135 U. S. 1; *Ex parte Condt.*, 112 U. S. 178; *Ex parte Royal*, 117 U. S. 241, 245; *Ex parte Fonda*, 117 U. S. 516; *Ex parte Lange*, 85 U. S.

Where the conviction and sentence are void, the Court will discharge the prisoner upon a Writ of Habeas Corpus.

IV.

The third Assignment of Error; that the Court erred in holding that the defendant should have been indicted by a Grand Jury. It is submitted that this contention is not supported by reason or authority. This Honorable Supreme Court in the case of *Delima et al.*, Plaintiffs in Error, vs. *George Bidwell*, decided May 27th, 1901, says, "We are unable to acquiesce in this assumption that a Territory may be, at the same time, both foreign and domestic." By the Second Art. of the Treaty of Peace between the United States and Spain, signed December 10th, 1898, and ratified April 11th, 1899, Spain ceded to the United States the Island of Porto Rico, which has ever since been in our possession and has been governed and administered by us. If the case depended solely upon these facts and the question presented, whether a country which had been ceded to U. S., the cession accepted, possession delivered, and the Islands occupied and administered by the United States, without interference by Spain or any other power, was a foreign or domestic territory; it would seem that there would be as little hesitation in answering this question as there would be in ascertaining the ownership of a house deeded in fee simple to a purchaser under law, who has signed the deed, taken possession, paid taxes, and made improvements without let or hindrance from his vendor. This is just exactly what was done in the case of Hawaii. The islands were ceded, the cession was accepted, and it became United States territory. It was not only the intention of Congress to admit Hawaii into a Constitutional union with the United States, but they have actually done so. The Constitutional provision securing life, liberty and property must have been in force and extended to Hawaii on the cession of the territory and the acceptance of the United States. The very words of the Resolution, "Municipal legislation of the Hawaiian Islands, not contrary to the Constitution of the United States, shall remain in force until the Congress of the United States shall otherwise determine", establishes beyond a question that only such laws as were not contrary to the Constitution would be enforced in these Islands, and Congress in Organic Act specially provided for a unanimous verdict. They do not provide in the Organic Act that no person shall be held for a capital, or infamous crime, unless on the Indictment of a Grand Jury, but they do provide that Grand Juries can be drawn in the manner

provided by the Hawaiian statute for Grand Juries. The fixed number of Grand Jurors—thirteen (13). If it was not intended that the constitutional provision with reference to the indictment by Grand Juries should not apply until the Organic Act was signed, or until it was specified in the Organic Act, why is the Organic Act silent on this point?

The Bible and the Altar are, and were, as much adhered to and respected at the time of the passage of the Newlands Resolution in Hawaii as in the State of California; the methods of taxation in this country were the same; the affairs of the Government, it was claimed by those in power, was carried on on the same lines as the State Governments in the United States; our system of jurisprudence copied that of the Union; Anglo-Saxon principles prevailed; we were American in theory and in practice, and every embassador, plenipotentiary and delegate sent from Hawaii urged upon Congress and the Senate of the United States that this was a civilized country, with a system of laws, with Courts, with Religion, with Intelligence, with Wealth, and that the time was ripe for annexation; and so Congress accepted us and accepted and relied upon the statements that the Hawaiian Ministers and Commissioners made at Washington as true, and the Constitution came here with the flag, and it was well known that the Constitution would be in force when the cession of these Islands was completed; and the indictment of the defendant by a Grand Jury was, and is, a constitutional right which the statute of an extinct Oligarchy cannot override or take away.

V.

The fourth, fifth and sixth Assignment of Errors, it is submitted cannot be sustained. The Hawaiian Islands were not acquired by conquest; there was no military occupation of them. The United States acquired them by a Joint Resolution of Congress and the Senate; took formal possession of them and held them without the interference of any foreign power; and the United States held them subject to the constitution and laws of the United States and not according to the laws of the Hawaiian Islands. "Any nation acquiring territory by treaty, or otherwise, must hold it subject to the Constitution and Laws of its own Government, and not according to the Laws of the Government ceding it." 1 *Wharton's Digest Int. Law*, p. 4; *Pollard Lessee* vs. *Hagen*, 3 Howard 212.

The rights and powers of sovereignty of a nation over its territory ceases on the transfer of that sovereignty to another Gov-

ernment by cession of its territory. The power to preserve peace and order may remain in the officers previously appointed by the ceding state until the actual presence of the agents of the succeeding government, but this does not apply that soverign power remains in the former nation. *United States* vs. *Reynes*, 9 How. 127; *Davis* vs. *Concordia*, 9 How. 280; *Montalt* vs. *U. S.*, 12 Howard 47; *U. S.* vs. *D'Autrieve*, 10 How. 609.

Immediately after the acceptance by the American Minister of the sovereignty and property of the Hawaiian Government every officer holding office under the Hawaiian Government immediately took an oath to support the Constitution and Laws of the United States and the Chief Justice of the Supreme Court of the Hawaiian Islands administered the oath on that day to a large number of the officials. Circuit Judge Perry, who presided at the trial and convicted and sentenced this prisoner, took the oath to support the Constitution and Laws of the United States on that day.

Every action of the Supreme Court of the Hawaiian Islands relative to the United States which impairs the supremacy of the national authority and the rights of persons under the Constitution of the United States, is void. *Texas* vs. *Wight*, 7 Wall 700; *Horn* vs. *Lockhart*, 17 Wall 570; *Sprout* vs. *United States*, 20 Wall 459.

We are dealing with territory of the United States, and not a sovereign State, and it is contended that the authority submitted by the Honorable Attorney General of the Territory of Hawaii on page 9 of his brief does not apply. It requires the unanimous verdict of twelve (12) Jurors to lawfully convict the prisoner of the crime of Manslaughter. This Honorable Supreme Court in the case of *Thompson* vs. *State of Utah* held that the State of Utah did not acquire, on its admission into the Union, the power to provide in respective felonies committed within its limits while it was a Territory; that they should be tried otherwise than by such a Jury as is provided by the Federal Constitution.

The verdict of nine (9) Jurors is in direct violation and contrary to the Constitution of the United States, and a violation of the Common Law of England. Such procedure is a menace and source of danger to her institution. The New York Court of Appeals in the case of *Cancemi* vs. *The People*, 18 N. Y. 37, decided that when one Juror was withdrawn by consent of the defendant that the conviction was absolutely void. Said the Court, "The State and public have an interest in the preservance of the liberty and lives of the citizens, and will not allow them to be taken away without due process of law."

Consent by the criminal cannot give jurisdiction. The right of a speedy and public trial by an impartial jury is guaranteed to every one accused of crime, by the Amendment to Art. VI of the Constitution of the United States and it is a right which cannot be waived. See case of *U. S.* vs. *Taylor*, 11 Fed. Rep. 470; *State* vs. *Maine*, 27 Conn. 281; *U. S.* vs. *Haskell*. 4 Wash. C. C. 402; *Wm. Hill* vs. *People*, 16 Mich. 351; *Thompson* vs. *State of Utah*, 170 U. S., decides that the provision in the national Constitution relating to trials by jury and to criminal prosecutions, applies to the territories of the United States.

The Hawaiian Islands at the time of the finding of the True Bill upon this Indictment was territory of the United States. The United States acquired this territory by Resolution of Congress and the Senate and accepted it and they held it subject to the Constitution of the United States Government and not according to the Laws of the Hawaiian Islands which in this respect are contrary to and in direct conflict with the United States Constitution. 1 *Wharton's Digest Int. Law*, p. 4; *Pollard's Leasee* vs *Hagan*, 3 How. 212.

VI.

The Newland's Resolution itself extended the Constitution to these Islands. After the cession and acceptance of the Hawaiian Islands, the Constitution of the Republic of Hawaii was certainly not in force. The people had a flag; it was the Stars and Stripes which was raised on that day. Absolute sovereignty and supremacy of the National Government existed, and surely the Constitution came also.

It is therefore submitted that the seventh assignment of error cannot be sustained. Trial upon such an indictment found by a Circuit Judge, who had taken an oath to support the Constitution of the United States amounts to nothing.

There was nothing to try and the conviction and sentence were therefore absolutely null and void.

It is submitted to this Honorable Supreme Court that it would have been an easy matter for the Attorney General and the Judge of the Court of Record, who held his office during the will and pleasure of the President of the United States to have prescribed the rules relating to Grand Juries, which the Supreme Court afterwards did and they could have protected the country from anarchy and crime effectually and completely and the rights of citizens and others upon United States territory would have been protected.

I address this Honorable Supreme Court through this brief in the spirit of our Constitution, "When a stranger places his foot upon American soil acquired in the way these Islands were, the ground he stands upon is holy and consecrated to the genius of Liberty." It makes no difference whether he is white or black, or how humble, he can only be tried and convicted and sentenced in accordance with the Constitution, and it was so held in *Ex parte Edwards,* 13 Hawaiian, which is now being prepared. We forward the decision; the Court was differently made up. Judge A. Perry did not sit.

There were extraordinary reasons for the interference of the United States District Court to grant this Writ of Habeas Corpus. Circuit Judge Gear had issued a Writ of Habeas Corpus and discharged the prisoner upon the ground that his trial, conviction and sentence were absolutely null and void and the Territory of Hawaii in the absence of a statutory provision allowing the Territory to appeal from a decision and order discharging a prisoner upon a Writ of Habeas Corpus appealed to the Supreme Court of the Territory and the Supreme Court of the Territory held that the conviction and sentence of this defendant was legal and valid. The case was fully presented to the Hawaiian Supreme Court and the Honorable Antonio Perry, who found the Bill of Indictment against this Defendant, who presided at his trial, and sentenced the prisoner, sat on the appeal in the Supreme Court, notwithstanding the protests filed by the prisoner's counsel that he was disqualified by the provisions of the Act to Provide a Government for the Territory of Hawaii. The provision of that Act is as follows:

"No Judge shall sit on an appeal, or new trial, in any case in which he may have given a previous judgment."

Circuit Judge Perry is now the Second Associate Justice of the Supreme Court of the Territory and was at the time of the hearing of this appeal, so that this Honorable Supreme Court may be fully conversant with the facts of this case, I respectfully append to this brief a copy of the brief filed in the Supreme Court on the hearing of this case on Appeal, and I respectfully submit that the Amendments to the Constitution were in force at the time of the trial and conviction of this prisoner and that ample legal machinery could have been provided for his lawful trial, conviction and sentence and that the Appeal of the Territory should be dismissed.

GEORGE A. DAVIS and F. M. BROOKS,
Counsel for the Prisoner, Osaki Mankichi.

APPENDIX.

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII, AUGUST TERM, A. D. 1901.

IN THE MATTER OF THE PETITION OF OSAKI MANKICHI FOR A WRIT OF HABEAS CORPUS.

APPEAL FROM THE ORDER OF THE SECOND JUDGE OF FIRST CIRCUIT COURT GRANTING SAID WRIT AND DISCHARGING SAID PETITIONER.

PETITIONER'S BRIEF ON APPEAL.

It is submitted that this Honorable Court is absolutely without jurisdiction to hear the appeals from the decision of the Circuit Judge in these cases. The Attorney General has relied upon Section 1145 of the Civil Laws, which provides that the Judges of the several Circuit Courts shall have power in Chambers within their respective jurisdictions, but subject to appeal to the Circuit or Supreme Courts according to law as follows:

In the 8th sub-section to issue writs of habeas corpus according to law, the appeal provided by law in the Statute, Sections 1433, 1434 and 1435, is not applicable to habeas corpus proceedings.

Section 1433 provides that a notice of appeal shall be filed within five days, accrued costs shall be paid and a bond given in the sum of Fifty Dollars.

Section 1434 provides that the Supreme Court shall have power to review, reverse, affirm, amend, modify or remand such decision, judgment, order or decree, in whole or in part; whereas in habeas corpus proceedings on appeal facts cannot be reviewed, as it is only the jurisdiction of the Court or excess of jurisdiction. This section also gives power to the appellate courts to hear newly discovered evidence. It also provides that nothing herein contained shall be construed to permit an appeal from any *order*, judge or administrator allowing any warrant, attachment, writ or other proceedings, or for any other order of a like nature.

Section 1435 provides that an appeal duly taken and perfected shall operate as an arrest of judgment and stay of execution and provides that execution may issue pending such appeal upon good and sufficient cause being shown therefor. Surely these

provisions do not apply to proceedings on appeal from a judgment or order discharging prisoners upon habeas corpus.

The general appeal is not applicable nor is there anything in the Section quoted, from which it can be inferred that they are applicable. The Supreme Court because of its Superior jurisdiction may discharge a prisoner held under criminal process, where the committment is voidable only, or where the grounds of committment are insufficient, but it must have appellate jurisdiction in the given case. It is not sufficient that it has a more extensive jurisdiction or is of higher dignity; it must have the power to reverse the judgment in the particular case; the power to correct or reverse the action of the inferior court. Where no such power exists, a court will refuse to act. The errors complained of were the grounds of committment and must be brought under review by the appellate court by means of an appropriate process and that is the writ of certiorari used in connection with the writ of habeas corpus. The record itself is never removed by the habeas corpus as it is by the certiorari; besides the certiorari goes to the Judge, but habeas corpus to the officer. Again, when certiorari issues in order to use the record as evidence, then the tenor of return is sufficient and court hears the appeal as for record, but when the record itself is to be proceeded upon, the record itself must be returned, and there is no difference when the proceeding upon the record is to be removed whether it be before judgment or after. In both cases, the record itself must be removed.

The effect of habeas corpus in removal of cause is only to suspend the proceedings of the inferior court, but the certiorari removes the cause.

The records in these cases were not properly before the Court, neither was the cause removed by notice of appeal by petitioner. See *Church upon Habeas Corpus*, 2d Edition, sec. 259.

In the cases therein cited, the right of appeal from a judgment on Habeas Corpus has been a matter of debate in the American Courts and it has been repudiated and denied by the ablest Courts and Jurists on the continent. *Macfarlane* vs. *Johnson*, 27 Texas 105; *Bill* vs. *State*, 4th Gill 301-304; *Ex parte Thompson*, 93 Ills. 89; *Hammond* vs. *The People*, 32 Ills. 446; see Sec. 389 *Church upon Habeas Corpus and note*, and the cases therein cited.

The Legislature has provided no procedure whereby an appeal can be taken from an order of a Circuit Court discharging a prisoner upon Habeas Corpus.

It is also further provided by Section 1674 of the Civil Laws that no person who has been discharged upon a Writ of Habeas

Corpus shall be again imprisoned or restrained for the same cause unless he shall be indicted therefor and convicted thereof or committed for want of bail by some court of record having jurisdiction in the cause. How then in the face of this statute can the judgment of the Circuit Judge discharging the prisoner from custody be suspended by any order of this Appellate Court?

An appeal is a Civil Law process and removes a cause entirely subjecting the law and the fact to a review or retrial. *Holmes* vs. *Johnson*, 14 Peter 621; 7th *Cranch*, U. S. 110; *U. S.* vs. *Tenbrook*, 2d Wheaton U. S. Reports 248.

These defendants were all discharged and the restraint removed; they had regained their liberty. The proceedings therefore must terminate in the Appellate Court and that Court will not enquire into the legality of a detention which no longer exists; such is the uniform practice. See *Ex parte Cole*, 14 Texas Appeals 579; see Section 89 *Church on Habeas Corpus*, page 142; note thereon.

In California it has been held that no appeal lies from the order of a Judge admitting a party to bail under the provisions of the Habeas Corpus Act. *Street* vs. *Schuster*, 40 Cal. 627.

In this State there is no appellate practice in Habeas Corpus cases. See *Church upon Habeas Corpus*, Section 389.

In the absence of any statute, the decision of a Circuit Judge discharging the prisoner can only be revoked by error or writ of error.

The common law of England and America is expressly made a part of our law in the absence of statute practice of the English Courts, and the procedure must be followed in order to give this Court jurisdiction. A writ of error would be the appropriate remedy because it is a common law process and removes for re-examination nothing but the law.

A decision on Habeas Corpus is not appealable, or subject to review. The section of *re adjudicata* has no application to such a case. See *Hawes on Jurisdiction*, Section 181; *Magter of Ring*, 28 Cal. 251; 2d *Cal.* 429; 10th *Gray* 240; 72 *Maine* 202; 60 *Pacific* 591; *Ex parte Thompson*, 93 Ills. 89; *Re Curley*, 34 Iowa 185.

A discharge under a Writ of Habeas Corpus by a Court of competent jurisdiction being in favor of personal liberty, is final and conclusive, and an arrest under the same charge is unlawful. *Ex parte Jiltz*, 64 Mo. 208.

The appellant has neither removed the cause nor the record into this Honorable Superior Court by any process known to law, and how can this Court be called upon to take jurisdiction and

hear a cause which is not properly before it? And especially in and over the Hawaiian Islands were ceded and transferred when the right of appeal is forbidden being granted to the respondent and the law has not conferred it upon him. See *The State* vs. *Everett,* and *State* vs. *Potter; Dudley So. Carolina,* 295-296.

The especial attention of the Court is called to the case of *Commonwealth,* 21 Gilbert; *Cummings same,* 21 James; *McGuires* 3 Cushing 212.

In this State a writ of error does not lie in a criminal case in behalf of the Commonwealth.

The right to file exceptions in a criminal case is confined to the defendant.

II.

It is further submitted, assuming that the cause and the record is before that appellate court, which is in no way admitted, than, what questions can this court review on appeal. A Circuit Judge certainly has jurisdiction to issue a writ of habeas corpus and to discharge the defendants, and this appellate court will not reverse the same for error where the court below nad jurisdiction in the cause and of the prisoner, and where it would not be reversable on a writ of error.

The jurisdiction and power to hear and determine same could be enquired into either before or after judgment, or in final conviction, but where the power or jurisdiction exists, its existence will not be enquired into. This applies to the respondent as well as to the prisoner.

It is further submitted that by a resolution passed by Congress and the Senate of the United States jointly, which resolution was signed by the President of the United States on the 6th day of July, 1898, all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands were ceded and transferred to the United States of America, which cession was accepted, ratified and confirmed by the Government of the Republic of Hawaii, and that after the signing of this resolution by the President of the United States, the Hawaiian Islands became annexed and a part of the territory of the United States and subject to the sovereign dominion thereof. 1st Bishop Sec. 114; *State* vs. *Carter,* 3 Dutcher 499-501; *State* vs. *Kelley,* 36 Maine 331; 49 American Report 620; 47 American Report 247; *Green* vs. *The State,* 66 Alabama 40-45; 41 American Report 744.

The crimes and offences which these defendants committed were committed in United States territory. They were charged

with capital and infamous crimes and bills of indictment were preferred and true bills were found thereon by the Judges of the Circuit Court, which it was claimed was without authority of law and jurisdiction, and in contravention of Article Five of the Amendment to the Constitution of the United States.

The resolution annexing this country provides that the municipal legislation of the Hawaiian Islands *not contrary to the Constitution of the United States,* shall remain in force until the Congress of the United States shall otherwise determine.

The finding of a true bill by the Circuit Judge or any other person or body, except a Grand Jury, properly and legally empowered to act at a term of the Court is a direct violation of Article 5 of the Amendment to the Constitution of the United States. What power or authority has a Circuit Judge to find a bill against a prisoner for a capital or infamous crime and place him upon his trial.

The case of *Ex parte Bane,* 121 U. S. page 1, overrules *Hurtardo* vs. *The People,* and expressly decides that a prisoner who was convicted and sentenced, and who was confined without the indictment of a Grand Jury, was illegally confined and is entitled to be discharged. There can be no mistaking this decision; it is far reaching.

The United States of America having acquired the Hawaiian Islands in the manner heretofore set forth could only hold them subject to the Constitution and laws of the United States, and the finding of a bill of indictment by a Judge of the Circuit Court renders the proceedings against these defendants absolutely void.

Any act on the part of the Courts of these Islands which impairs the sovereignty of the national authority and the rights of defendants under the Constitution of the United States is void. *Texas* vs. *White,* 7 Wall 700; *Horne* vs. *Lockhardt,* 17 Wall 570; *Sprout* vs. *United States,* 20 Wall 459.

Some of these defendants were convicted by less than twelve jurors. These convictions and sentences were absolutely void. See the case of *Thompson* vs. *The State of Utah,* 170th U. S. page 344.

The Supreme Court of the United States decided in this case that the jury referred to in the Federal Constitution, and in the Sixth Amendment thereto, was a jury composed as it was in common law, of twelve persons, neither more nor less, and that the State of Utah did not acquire upon its admission into the Union, the power to provide in respect to felonies committed within its limts, while it was a Territory, that they should be tried

otherwise, than by such a jury, and as provided by the Federal Constitution.

They also decided that it is not in the power of a person accused of felony, by consent expressly given, or by silence to authorize a jury of only eight persons to pass upon his guilt instead of a complete jury of twelve persons.

Says the Supreme Court of the United States:

"If one under trial for a felony, the punishment of which is confinement in the penitentiary, could not legally consent that the trial proceed in his absence, still less could he consent to be deprived of his liberty by a tribunal not authorized to detain him by law to ascertain his guilt."

In our opinion the provision of the Constitution of Utah providing for trial in Courts of general jurisdiction of criminal cases, not capital, by a jury composed of eight persons is *ex post facto,* and it is applicable to felonies committed before the Territory became a State, because in respect to such crime, the Constitution of the United States gives the accused at the time of the commission of his offense, the right to be tried by a jury of twelve persons, and makes it impossible to deprive him of his liberty except on the unanimous verdict of such jury.

The Supreme Court of the United States in the case of *Delima et al., plaintiffs in error,* vs. *George R. Bidwell,* decided on May 27th, 1901, says:

"We are unable to acquiesce in this assumption that a Territory may be at the same time both foreign and domestic."

That also decided that Porto Rico was not a foreign country, even within the meaning of the tariff laws, and their language is hereby cited, to-wit:

"We are therefore of the opinion that at the time these duties were revised, Porto Rico was not a foreign country within the meaning of the tariff laws, but a Territory of the United States; that the duties were illegally exacted and that the plaintiffs are entitled to recover them back."

It must be remembered that Porto Rico was acquired through war. The Supreme Court of the United States in its opinion in this case expressly states that the Island had been for some months under military rule of the United States as a conquered country.

When by the Second Article of the Treaty of Peace between the United States and Spain, signed December 10th, 1898, and ratified April 11th, 1899, Spain ceded to the United States the Island of Porto Rico, which has ever since been in our possession

and has been governed and administered by us. If the case depended solely upon these facts, and the question presented whether a country which had been ceded to us, the cession accepted, possession delivered, and the Island occupied and administered by the United States without interference by Spain, or any other power, was a foreign country or domestic territory, it would seem that there could be no little hesitation in answering this question, as there *would be in ascertaining the ownership of a house deeded in fee simple to a purchaser under law, who has accepted the deed, taken possession and paid taxes and made improvements without let or hindrance from his vendor.* This is just exactly what was done in the case of Hawaii. The Islands were ceded, the cession was accepted and it became the United States Territory. Whereas the Island of Porto Rico was acquired by treaty after conquest. It was not only the intention of Congress to admit Hawaii into a constitutional union with the United States, but they have actually done so.

The constitutional provisions securing life, liberty and property must have been in force and extended to Hawaii on the cession of the Territory, and the acceptance of the United States. The very words of the resolution—"Municipal legislation of the Hawaiian Islands not contrary to the Constitution of the United States, shall remain in force until the Congress of the United States shall otherwise determine"—establish beyond question that only such laws as were not contrary to the Constitution would be enforced in these Islands, and Congress in the Organic Act specially provides for a unanimous verdict. They did not provide under the Organic Act that no person shall be held for capital or infamous crime unless on indictment of a Grand Jury, but they did provide that Grand Juries can be drawn in the manner provided, for Hawaiians, by the Hawaiian statute for drawing jurors. The fixed number of Grand Jurors is thirteen. If it was not intended that the constitutional provisions with reference to the indictment of Grand Juries should not apply until the Organic Act was signed, or until it was specified in the Organic Act, why is the Act silent on this point?

On page 26 of the Attorney General's brief, he uses this language:

"If those possessions are inhabited by alien races differing from us in religion, custom, laws, methods of trade and modes of thought, the means of government and justice, according to the Anglo-Saxon principles, may for a time be impossible, and the question at once arises whether large concession ought not to be

made for the time that ultimately our own theories may be carried out and the blessings of a free government under the Constitution extend to them." "We decline to hold there is anything in the Constitution to forbid such action."

This reasoning does not apply to Hawaii, for there are no heathen in these Islands at the present time. The Bible and the altar are and were as much adhered to and respected at the time of the passage of the resolution, in Hawaii, as in the State of California. Our laws and customs were the same. The methods of taxation were the same. The administration of Government was carried on and it was the boast of those in power that they followed the Government of the United States closely. Our system of jurisprudence copied that of the Union. Anglo-Saxon principles prevailed. We were American in theory and in practice and every ambassador, plenipotentiary and delegate, sent from Hawaii, urged upon Congress and the Executive that this was a civilized country with a system of laws, with courts, with religion, with intelligence, with wealth, and that the time was ripe for annexation, and so Congress accepted us, and accepted, believed and relied upon the statements that our ministers and commissioners made at Washington, as true, and the Constitution came here with the Flag, and Congress well knew that the Constitution would be in force when they accepted these Islands.

We submit that the statement on pages 28 and 29 of the Attorney General's brief, that a State can dispense with indictments by Grand Juries, that it can dispense with unanimous verdicts, that it can dispense altogether with trial by jury, and that the provisions of the Constitution in regard to these matters are held by the Supreme Court of the United States not to apply, is a most remarkable statement, and will not bear investigation. In the cases just cited, that of *Thompson* vs. *The State of Utah*, the Supreme Court of the United States held that the State of Utah did not acquire on its admission into the Union the power to provide in respect to felonies committed within the limits while it was a Territory. That prisoners accused of crime should be tried otherwise than by such a jury as provided by the Federal Constitution, and also decided that the provision of the Constitution of Utah providing for the trial courts of general jurisdiction of criminal cases, not capital, by a jury composed of eight persons is *expost facto* in its application to felonies committed before the Territory became a State.

If Hawaii was admitted into the Union and followed the suggestion of the Attorney General by the provision in its Constitu-

tion that no indictment was necessary; that a less number than twelve jurors could try and convict a person accused of crime which was committed in this Territory, he would find that such a provision would be of no avail and that the Supreme Court of the United States would follow the very able decision of Mr. Justice Harlan, delivered in the case of *Thompson* vs. *The State of Utah,* and which is law in the United States and its several Territories. Says Mr. Justice Harlan:

"It was not for the State in respect of a crime committed within its limits while it was a Territory to dispense with that guarantee simply because it people had reached the conclusion that the truth could be as well determined, and the liberty of an accusee be as well guarded by eight as by twelve jurors in a criminal case. The law in force when this crime was committed did not permit any tribunal to deprive him of his liberty except on the countenance of a court and a jury of twelve persons. The wise men who framed the Constitution of the United States, and the people who relied upon it, were of the opinion that life, liberty and property, when involved in criminal prosecution cannot be adequately detained except through the unanimous verdict of twelve jurors."

These Islands became Territory of the United States and Congress by the Organic Act, created a Territory, not a State, and all the provisions of the Federal Constitution with reference to life, liberty and property, the provisions of the National Constitution relating to trials by jury for crimes and to criminal prosecution, apply to the Territories of the United States. We are dealing with Territories—this is a Territory, and the reasoning of the Attorney General's brief and the startling statements made as to indictments and prosecutions are silenced by the decision in *Thompson* vs. *The State of Utah,* which is to the Court of last resort of the Republic of which we are now a part and were a part at the time these defendants were tried, convicted and sentenced.

Says the Supreme Court of the United States in *Ex parte Bain*: "In the syllabus according to principles long settled in this Court, the prisoner who stands sentenced to the penitentiary on such a trial (referring to a trial without an indictment by the Grand Jury) is entitled to his discharge by writ of habeas corpus."

This means that he will be discharged from custody and that he cannot be held, imprisoned or detained in a convict prison of a Territory of the United States, or any place within its jurisdiction, without having been tried upon an indictment preferred and

found by a Grand Jury, and found guilty by a unanimous verdict of twelve jurors. See *Ex parte Lange*, 85 U. S. 18; 18th Wall 163; *Ex parte Lange*, 85 U. S. 18; *Ex parte Parker*, 93 U. S. 18; *Ex parte Wilson*.

The Supreme Court of the former Territory of Hawaii has as a rule given great weight to the decisions of the Supreme Court of the State of Massachusetts.

In the case of *Jones* vs. *Robbin*, 8 Gray 329, wherein Justice Shaw says: "That the Grand Jury is as valuable as ever in securing individual assistance from an open and public accusation of crime from the trouble, expense and anxiety of a public trial before a probable cause is established by the preferment and indictment of a Grand Jury. And in the case of high offenses it is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty, recognized again and again by the highest tribunals of the Nation.

Says Justice Harlan citing from the case of *Callan* vs. *Wilson*, 127 U. S. 540:

"The recognition was demanded and secured for the benefit of all the people of the United States as well as those permanently or temporarily residing in the District of Columbia, or those residing or being in the several States. There is nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of this District may be lawfully deprived of any of the benefits of the constitutional guarantee of life, liberty and property, *especially of the privilege of trial by jury in criminal cases.* We cannot think ," the Court further says. "that the people in this District have in that regard less rigtns than those accorded to the people of the Territory of the United States."

The Attorney General of the United States has expressly stated that Hawaii became the Territory of the United States upon the signing of the joint resolution known as the "Newlands" resolution, by the President.

The decision of the Judge who discharged these prisoners and the opinion and decision filed by him is hereby referred to, and this Honorable Supreme Court is respectfully requested to consider it as a part of this brief.

The attention of this Honorable Supreme Court is again respectfully called to, and it is submitted that there is no legislation or established practice for the guidance of parties invoking

the jurisdiction of the Supreme Court in habeas corpus proceedings.

In the note to Section 69: "Prior to 1867 there were no regulations or established practice for the guidance of parties invoking jurisdiction of the Supreme Court and it was necessary to issue a Writ of Certiorari in addition to the Writ of Habeas Corpus. See *Ex parte McCardle*, 6th Wall, 318, 324.

Says Chief Justice Chase in delivering the opinion of the Court:

"But although the exercise of appellate jurisdiction over judgment of inferior tribunals was not uniform to the practice of this Court before the Act of 1867, it was attended by some inconvenience and embarrassment. It is necessary to use the *Writ of Certiorari* in addition to the Writ of Habeas Corpus, and there is no regulation or established practice for the guidance of parties invoking jurisdicton."

In the case of *Ex parte Dougan*, 2d Wall 134: This Court by Habeas Corpus aided by Writ of Certiorari reviewed and revised the judgment of the Circuit Court of the District of Columbia. In that case the prisoner brought before the Circuit Court had been remanded, but was discharged upon Habeas Corpus issues out of this Court.

It is submitted that the jurisdiction of this appellate court in the cause is not complete until the record is removed as well as the order and judgment of the Judge of the Circuit Court discharging the prisoner from custody and that can only be done by aid of a certiorari in this jurisdiction.

We respectfully submit that this Appeal must be dismissed for want of jurisdicton and upon the merits.

GEO. A. DAVIS,
F. M. BROOKS,
Counsel for Petitioners.

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII.

IN THE MATTER OF THE PETITION OF IHARA ICHIGORO ET AL.

APPEAL.

To the Honorable the Supreme Court of the Territory of Hawaii:

Upon examination of the Records in the within cases we find that Associate Justice The Honorable Antone Perry found true Bills upon the Indictments and presided at the trial of the following cases: THE REPUBLIC OF HAWAII vs. IHARA ICHIGORO, OSAKI MANKICHI, YAMANE NENCHIRO, in the Circuit Court, which are now being considered on appeal, and sentenced and sat in Judgment upon the said cases. We therefore respectfully submit that under and by virtue of Section 84 of The Act to Provide a Government for the Territory of Hawaii, the said Associate Justice is disqualified from sitting as Judge and hearing and deciding the appeal of the Territory in all of the within causes, they having been argued and submitted together as one case on appeal to this Honorable Supreme Court.

Dated this 15th day of August, A. D. 1901.

(Signed) GEORGE A DAVIS,
(Signed) F. M. BROOKS,
Counsel for the Defendants.